SUPREME COURT, U.S.
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No. 02-946

In the

Supreme Court of the United States

BOARD OF EDUCATION OF THE PAWLING CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

STEVEN SCHUTZ, YVONNE SCHUTZ and STATE EDUCATION DEPARTMENT OF THE STATE OF NEW YORK, FRANK MUNOZ, as the State Review Officer of the State Education Department of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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INTRODUCTION

Petitioner Board of Education of the Pawling Central School District ("District") submits this Reply Brief pursuant to Supreme Court Rule 15(6) to address new points raised in the brief in opposition to the Petition for a Writ of Certiorari ("Petition") submitted by Respondents Steven Schutz and Yvonne Schutz ("Parents"). Neither the New York State Education Department nor its State Review Officer oppose the District's Petition.

The Parents agree that in *School Committee of the Town of Burlington, Massachusetts v. Department of Education*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed.2d 385 (1985), ("*Burlington*") and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed.2d 284 (1993), ("*Carter*") this Court initially established two important precedents that lay a foundation for the decision in this case. Contrary to Respondents' sweeping statement that the issues presented in the Petition are "well settled by this Court" (Respondents' Brief, p.1), however, those decisions are but a springboard for the novel issues raised here. (Petition, pp.15-26). Both the Second Circuit's decision, and the decision of the State Review Officer upon which it was based, were issued after Congress created independent statutory standards for awarding tuition reimbursement under the 1997 amendments to the IDEA (20 U.S.C. §§1412(a)(10)(C)) and relied on a 1999 amendment to federal regulations and its commentary, issued long after this Court first authorized tuition reimbursement as an equitable remedy in *Burlington* and *Carter*.

I. THE PETITION RAISES IMPORTANT AND NOVEL QUESTIONS OF FEDERAL LAW INVOLVING CHILDREN WITH DISABILITIES NEVER ADDRESSED BY THIS COURT

Respondents assert that by not appealing the State Review Officer's 1998 decision sustaining a hearing officer's award of tuition reimbursement for the 1995-96 and 1996-97 school years "the District acknowledged the propriety of the parents' unilateral placement at the private school desired by the parents." (Respondents' Brief, pp. 3-4.) In fact, at the time he issued the decision which forms the basis of this appeal, the State Review Officer underscored that:

> prior decisions by the State Review Officer to award tuition reimbursement to the parents of a child who has been unilaterally placed in a private school by the parents **should not be construed as either a school district or State Education Department determination to place the child in that school, thereby changing the child's placement to the private school.**

App. 45a. (Emphasis added).

Thus, in accordance with the law at the time and the law of this case, the District's decision not to appeal the order of the State Review Officer awarding tuition reimbursement for the 1995-96 and 1996-97 school years was simply strategic. Instead of pursuing unnecessary and protracted litigation over a reimbursement order

that never established the Kildonan School as a placement[1], as set forth in the last stipulation with the Parents, the District sought to work with them to address past deficiencies in an outdated individualized education program ("IEP") and develop a mutually acceptable placement. App. 58a.

Respondents also assert that "the State's prior unappealed decision in favor of the Schutzes and their private school placement constituted an agreement between the State and the parent to a change of placement." (Respondents' Brief, p. 4.) Again, the State Review Officer acknowledged, in accordance with the law at the time he awarded tuition reimbursement in 1998, that he could not and did not agree with the Parents, by virtue of his award, that Kildonan had become the student's current educational placement. App. 45a. Thus, the State Review Officer's decision also refutes Respondents' statement that the State's holding in 1998 constituted "defacto" recognition that the school "was meeting state standards." (Respondents' Brief, p. 8.) In addition, the Complaint, which must be taken as true at this point, alleges otherwise and specifically states that, as such, neither the State Review Officer, the State Education Department, nor the District can place the student at the Kildonan School. App. 54a-55a.

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[1] As a result of the Second Circuit's decision, districts are now compelled to litigate old individualized education programs as the only way to escape the indefinite financial liability for costly prospective private school tuition imposed following a one-time award of tuition reimbursement. Before this decision, districts could safely agree to reimburse a parent's tuition, while de veloping the capacity to offer a free appropriate public education in the least restrictive environment appropriate to the needs of the child.

Respondents' assertion that it would "be patently unfair to the disabled child to require him/her to return to a placement already deemed inappropriate by both the State and as here, the local education agency when the parties disagree about a subsequent change in placement" (Respondents' Brief, pp. 11-12) is contrary to the facts, as well. As alleged in the Complaint, at all times relevant to this appeal, Kevin attended the Kildonan School, where his Parents, not the local District or the State, secured his enrollment year after year. App. 56a-60a. Given the facts, the District could not have "require[d] ... [the student] to return to a placement already deemed inappropriate." (Respondents' Brief, pp. 11-12.) To the contrary, as the Complaint alleges, the placement recommended for the student in 1999-2000, which was calculated to afford Kevin educational benefits in the least restrictive environment, was substantially different from the IEP recommended for the 1995-96 school year which the hearing officer rejected and the State Review Officer dismissed on procedural grounds. App. 58a. Moreover, the gravamen of the Complaint and the Petition is premised on the fact that tuition reimbursement is a post hoc remedy for a District's failure to offer a student a free appropriate public education ("FAPE"). All the District ever sought was the opportunity to establish, at hearing, whether its IEP offered the student a FAPE for the year in question, **before** it could be ordered to reimburse the Parents for their son's tuition at a private school where they enrolled him for the 1999-2000 school year and for any other year they sought tuition reimbursement thereafter.

Rather than restating well settled law, the ruling below is a watershed decision that marks the beginning

of a new generation of cases under the IDEA that converts and elevates a post hoc payment of tuition to remedy a flawed IEP into a new "placement" pursuant to the pendency provision of IDEA, resulting in multiple years of liability for a student's private school tuition. The decision of the Second Circuit charts an adjudicatory course for parents to obtain years of public funding for the private school of their choice not available before, which is otherwise unobtainable to any child with disabilities whose parents follow the statutorily prescribed IEP process as set forth in the IDEA. 20 U.S.C. §§ 1400 *et. seq.* As Respondents acknowledge "such placements need not meet state standards or be on an approved list." (Respondents' Brief, p. 6.) Thus, there is no dispute that the precedent established below circumvents the state and federal prohibition against a publicly funded placement in a segregated private school without a determination that separate schooling is required to meet the needs of the student (20 U.S.C. §§1412(a)(5)(A)), and eviscerates IDEA's mandate that such school meets State curriculum standards and is monitored by the state educational agency. 20 U.S.C. §§1412(a)(11). The Second Circuit's decision ignores that public school districts are now required to fund private school tuition to "maintain the student's placement" during the pendency of a new proceeding, even though, as alleged in the Complaint, a district is prohibited from writing an IEP or securing the student's placement there even after the State Review Officer's ruling. App. 54a-55a.

Thus, the decision of the Second Circuit Court of Appeals not only raises important questions of federal law never resolved by this Court, but also creates an irreconcilable conflict between a procedural safeguard that now leverages placements inconsistent with the

IDEA and the substantive rights it was designed to protect.

Under this ruling, the assurance this Court gave to public schools in *Carter* that they could avoid paying private school tuition by correcting their deficiencies and offering the student a FAPE in the least restrictive environment ("LRE") has also been extinguished. Under the Second Circuit's holding, it is no longer true that by "giv[ing] the child a free appropriate public education in a public setting, or by plac[ing] the child in an appropriate private setting of the State's choice," *Carter*, 510 U.S. at 15, a public school can avoid liability for a student's continuing private school tuition. Furthermore, as in this case, even though the State Review Officer created a "pendency placement" in a nonapproved school, neither the District nor the State has the option under the law to place the student in that school, even though determined to be "the State's choice". *Id.*

Until this decision, parents who removed their children from publicly approved placements did so at their financial risk. *Burlington* at 471 U.S. at 373. Under the previous standard, districts were encouraged to abandon further litigation, pay the tuition, as ordered, correct deficiencies in the IEP, and work with the parents to offer an appropriate placement. As this Court first recognized when it declared tuition reimbursement as an equitable remedy under the IDEA, only where "appropriate relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school" (*Burlington*, 471 U.S. at 370) could a State level review officer require a district to maintain the student there in the future. Under this ruling,

however, the mere award--of tuition reimbursement, regardless of the facts or circumstances, automatically triggers an agreed upon placement, and the District's continuing financial responsibility for the student's tuition "until a new placement is established by either an actual agreement between the parents and the District, or by an administrative decision upholding the District's proposed placement which [the Schutzes] choose not to appeal, or by a court..." App. 13a.

Thus, the compelling question is whether Congress intended to create a judicially authorized "voucher program" by converting a retroactive award of tuition reimbursement into the student's pendency placement for parents who abandon the public schools and have the financial wherewithal to enroll their children at their expense in private schools not available as legally authorized placements under IDEA. In the absence of evidence that Congress abandoned the protections traditionally afforded to public schools against such liability, previously assured by both this Court in *Carter* and guaranteed by Congress in its 1997 amendments to the IDEA, the case raises compelling questions which the Petitioner asks this Court to address.

In view of its extraordinary impact on the implementation of this most important federal statute involving public education and students with disabilities, and its impact on the rights and obligations of public schools and parents, Petitioner urges this Court to grant the writ of certiorari.

CONCLUSION

Petitioners do not ask this Court to revisit any settled questions of federal law. The decision below implicates important questions which this Court has not addressed and which arise under amendments to the IDEA and federal regulations which post date this Court's equity rulings. Review of these questions on a writ of certiorari is warranted to resolve these novel questions and to define the mutual rights and obligations of local school agencies and parents of students with disabilities under the IDEA. The Petition should be granted.

Respectfully submitted,

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